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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. 273

THE MACCABEES and MODERN WOODMEN OF AMERICA,
Petitioners,

vs.

MRS. FLORENCE S. CARTER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, The Maccabees and Modern Woodmen of America, pray that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to

review a final judgment of that Court made and filed April 10, 1950, which affirmed the judgment of the United States District Court for the Middle District of Tennessee in favor of respondent.

The above cases were commenced in the Circuit Court of Davidson County, at Nashville, Tennessee and removed to the District Court on July 12, 1947 on account of the diversity of citizenship and the amounts involved.

They were consolidated and tried together in the District Court (R. 16). There was only one transcript of the record filed in the Court of Appeals and they were argued together in that Court.

A certified transcript of the record in the consolidated causes, including the proceedings in said Court of Appeals, is furnished herewith in compliance with Rule 38 of this Court.

JURISDICTIONAL STATEMENT.

It is insisted by petitioners that the Supreme Court has jurisdiction to review the judgment here in question under Title 28 United States Code, section 1254 (1).

Application for stay of execution of mandate was made to Judge John D. Martin of the Sixth Circuit Court of Appeals on June 9, 1950 for the purpose of filing petition for certiorari in this Honorable Court, which stay was granted "for a period of time including the 27th day of August, 1950," upon petitioners executing a good and solvent bond in the sum of Forty Three Thousand and no/100 ($43,000.00) Dollars, which was done.

SUMMARY STATEMENT OF MATTER INVOLVED.

The petitioner, The Maccabees, is a Fraternal Benefit Society, chartered and organized under the laws of the State of Michigan.

The petitioner, Modern Woodmen of America, is also a Fraternal Benefit Society, chartered and organized under the laws of Illinois.

Both were licensed to do business in Tennessee and were doing business in Tennessee at the time these suits were filed against them.

It was stipulated in writing in the District Court by the attorneys representing both the plaintiff and the defendants, and filed as a part of the record in the cause that the defendants are both Fraternal Benefit Societies and were qualified with the Commissioner of Insurance of the State of Tennessee to write Fraternal Benefit insurance in this State (R. 18).

From December 4, 1940 to March, 1945 The Maccabees had issued six (6) certificates on the life of one John T. Carter, a resident of Marshall County, Tennessee, in the total sum of Seventeen Thousand and no/100 ($17,000.00) Dollars. Two of these were sick and accident certificates and four of them were life certificates having double indemnity benefits.

On August 8, 1941, Modern Woodmen of America issued a certificate on his life in the sum of Five Thousand and no/100 ($5,000.00) Dollars. This certificate also had a double indemnity benefit provision. His wife (the respondent here), Mrs. Florence S. Carter, was named as beneficiary in each certificate.

(The parties will be referred to hereafter as they appeared in the District Court.)

On March 5, 1949, the complainant in each of the removed cases filed her complaint in the District Court in which she alleged that her husband, the said John T. Carter, on June 13, 1946 came to his death "through external violent and accidental means" by a pistol shot through the head (R. 3).

It was admitted in each complaint that the defendants had paid to her the face amounts of each life certificate but had not paid the face amounts of the two accident certificates. She sued each society on the five life certificates for

(1) double indemnity benefits

(2) 25% penalty and

(3) 6% interest.

She also sued The Maccabees for the face amounts of the accident policies, for 25% penalty and interest (R. 8 and 14).

She averred that the societies' refusal to pay the "double indemnity" demanded by her was in "bad faith" and that she was entitled to a statutory penalty.

The defendants filed separate answers in which they set up the following defenses:

(1) That the insured did not come to his death by accidental means, but that he committed suicide;

(2) That they were not in "bad faith" in their refusal to pay double indemnity as demanded by plaintiff;

(3) That the defendants are Fraternal Benefit Societies and, under the laws of the State of Tennessee, are not liable for penalties (R. 9 and 15).

From this record of 558 pages comprising the trial of this case before the Court and jury for four days (R. 550), it will be seen that the questions of "double indemnity" and of "bad faith in refusing to pay the amounts demanded by the complainant" were hotly contested. However, the jury found the issues in favor of the plaintiff (R. 32) and the Court entered judgments in her favor as follows:

Against The Maccabees in the sum of Thirty Thousand Seven Hundred Fifty-four and 17/100 ($30,754.17) Dollars, of which **Six Thousand One Hundred Fifty and 83/100 ($6,150.83) Dollars** was penalty and against Modern Woodmen of America in the sum of Six Thousand Nine Hundred Eighty-nine and 59/100 ($6,989.59) Dollars, of which **One Thousand Three Hundred Ninety-seven and 92/100 ($1,397.92) Dollars** was penalty (R. 51 and 52).

Motion for a new trial was made and overruled (R. 53). Appeal to the Court of Appeals for the Sixth Circuit (R. 65) affirmed April 10, 1950. Petition for rehearing denied May 29, 1950 (R. 591).

QUESTION PRESENTED.

The question presented in this petition for certiorari is,

Are Fraternal Benefit Societies in Tennessee Liable for Statutory Penalties?

This question arises out of the construction of Tennessee Code Sections 6360 and 6434 set out in the Appendix hereto.

We also set out there Code Sections 6357, 6358 and 6424, which are to be considered therewith.

(We shall hereafter refer to Code Sec. 6360 as "The Exemption Statute" and to Code Sec. 6434 as "The Penalty Statute".)

JUDGMENT OF THE COURT BELOW.

The opinion of the Court of Appeals in the instant case is not reported. The above cases were argued in the Court of Appeals on April 6, 1950 and on April 10, 1950 the Court entered the following order:

> "This case came on to be heard on the record and briefs and oral argument of counsel.
>
> "And it appearing that the verdict of the jury is supported by substantial evidence.
>
> "And it appearing that under Tennessee law fraternal benefit societies fall within the purview of and are governed by the provisions of Section 6434, Williams' Tennessee Code; Snyder v. Mystic Circle, 122 Tenn. 248, 268; Cf. Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406.
>
> "And no reversible error appearing in the record,
>
> "It is ordered that the judgment of the District Court be, and it hereby is, affirmed.
>
> "Approved for Entry.
>
> s/ Florence S. Allen,
> Circuit Judge."

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

Exercise of the discretionary power of this Court to grant the writ of certiorari herein prayed for is asked upon the following grounds:

1. **The Court of Appeals has rendered a decision in this case in conflict with the decision of another Circuit Court of Appeals on the same matter.**

The decision of the Court below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in Railway Mail Assn. v. Chamberlin, 148 Fed. (2) 206.

2. **It has decided an important question of local law in conflict with an applicable local decision.**

It is in conflict with the decision of the Court of Appeals of the State of Tennessee in Brotherhood of Railroad Trainmen v. Daniels, 18 Tenn. App. 266, 75 S. W. (2) 1019.

3. **It has decided an important question of general law in a way untenable or in conflict with the weight of authority.**

4. **It has so far departed from the accepted and usual cause of judicial, or so far sanctioned such a departure by the lower Court as to call for an exercise of this Court's power of supervision.**

Title 28, U. S. Code, Sec. 1254 (1);
Supreme Court Rule 38, subdivision 5 (b).

We shall discuss these reasons or grounds in our Brief, which is attached hereto.

Wherefore, your petitioners respectfully pray that a **writ of certiorari** be issued out of and under the seal of

this Honorable Court, directed to the Court of Appeals for the Sixth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in the case of The Maccabees and Modern Woodmen of America, Appellants-Defendants, against Mrs. Florence S. Carter, Appellee-Plaintiff, numbered 11,000 on its docket, and that said judgment of the Court of Appeals for the Sixth Circuit as to the infliction of 25 per cent penalty may be reversed by this Court and that your petitioners may have such other and further relief in the premises as to this Court may seem just; and your petitioners will ever pray.

THE MACCABEES and
MODERN WOODMEN OF AMERICA,
Petitioners,

By: McLANE & BATES,
WATKINS, MOORE & CROWNOVER,
Solicitors for Petitioners.

DAVID A. HERSH,
GEORGE G. PERRIN,
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Respondent.

BRIEF

In Support of Petition for a Writ of Certiorari.

JURISDICTION.

The facts supporting the jurisdiction of this Court are set forth in the petition.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

(1) The decision of the Court below is in conflict with the decision of the Court of Appeals for the Eighth Circuit in Railway Mail Assn. v. Chamberlin (1945), 148 Fed. (2) 206, 10 C. C. H. 772, on the same matter which affirmed

a judgment of the U. S. District Court for the Eastern District of Arkansas.

Two questions were argued in the case:

First, was the defendant, the Railway Mail Association, a Fraternal Benefit Society as defined by the laws of Arkansas; and,

Second, if so, was it liable for statutory penalty for failure to pay the claim?

The Arkansas Exemption Statute is word for word with the Tennessee Exemption Statute, Code Sec. 6360 and is set out in the appendix.

It is Section 7857 of the Pope's Statutes of Arkansas, adopted in 1937 and is Section 66-1504 of the Code of Arkansas of 1947.

The plaintiff relied on Section 7670 of Pope's Arkansas Code of 1937 taken from the Statutes of Insurance and not from the separate statutes on Fraternal Benefit Societies, which section we include in the appendix hereto.

The District Court allowed a recovery for the face amount of the certificate of $4,000.00 but denied the penalty. It held that the defendant was a fraternal benefit society, and as such, that it was not liable for the penalty.

The Court of Appeals affirmed this decision.

The attorneys for the plaintiff contended in the Courts below that the decision of the Court of Appeals of the Eighth Circuit in the Chamberlin case is not authority here for the reason that Fraternal Benefit Societies are not mentioned in Section 7670 of the Arkansas Code and, therefore, came within the penalty provision.

The Supreme Court of Arkansas in the case of Galleghy v. American Insurance Co., 180 Ark. 4, 20 S. W. (2) 642,

held that Section 7670 does not apply to Fraternal Benefit Societies.

(2) The decision of the Court of Appeals in the instant case is in conflict with the decision of the Court of Appeals of the State of Tennessee in the case of Brotherhood of Railroad Trainmen v. Daniels (1934), 18 Tenn. App. 264, 75 S. W. (2) 1019.

It was held in that Court:

> **"It is conceded that the defendant is a fraternal benefit association or society operating upon the assessment plan, and its liability or non-liability must be determined by the common law and the Tennessee Statutes particularly applicable to it, and not by statutes applicable to life insurance companies."**

(All the emphasis [bold face type] in the Petition and Brief ours.)

(3) It has decided an important question of general law in a way untenable, or in conflict, with the weight of authority.

(4) It has so far departed from the accepted and usual cause of judicial, or so far sanctioned such a departure by the lower Court as to call for an exercise of this Court's power of supervision.

The decisions hereinafter cited under "Argument" apply to both "Reasons" 3 and 4.

So far as we can find, no opinion has been written by the Supreme Court of Tennessee in which it held that the "Exemption Statute", Code Sec. 6360, does or does not come "within the purview" of, and is governed by the provisions of the "Penalty Statute", Code Sec. 6434, but it denied the petiton for certiorari in the above mentioned

case of Brotherhood of Railroad Trainmen v. Daniels, and thereupon, set its approval upon said decision.

The decisions of the Court of Appeals of Tennessee are final in all civil cases within its jurisdiction (Code Sec. 10618) and can only be modified, changed or reversed by the Supreme Court on petition for certiorari (Code Sec. 10629).

> "The only mode by which the Supreme Court reviews a judgment or decree of the Court of Appeals is by writ of certiorari, and then only from a final judgment."
>
> Greenwood Bank v. Planters Bank, 158 Tenn. 50, 12 S. W. (2) 528.

BINDING DECISION.

Appellants insist that the decision of the Court of Appeals of Tennessee in the case of Brotherhood of R. R. Trainmen v. Daniels, supra, wherein the petition for certiorari was denied by the Supreme Court of Tennessee, is binding on the Federal Courts.

CONSTRUCTION AND INTERPRETATION OF LOCAL LAWS BY FEDERAL COURTS.

Since the case of Erie R. R. v. Tompkins, 304 U. S. 64, Federal Courts are committed to the doctrine that they must follow the statutes and decisions of the court of last resort of the state in which the action is pending, or whose laws are applicable to the issue.

In the case of West v. American Telephone & Telegraph Co., 311 U. S. 223, 132 A. L. R. 961, this Court held:

> "There are many rules of decision commonly accepted and acted upon by the bar and superior courts,

which are nevertheless laws of the State although the highest Court of the State has never passed upon them. In those circumstances a Federal Court is not free to reject the state rule merely because it has not received the sanction of the highest court of the state, even though it thinks the rule is unsound in principle or that another is preferable."

We beg leave to remark that the opinion of the Court of Appeals in the Daniels case **received the approval** of the Supreme Court of the State.

Following the Erie case, the Supreme Court has broadened the rule and held that if neither the courts of last resort nor intermediate courts of the state have passed upon the question raised by the pleadings, it is the duty of the Federal Court to look up other available data, and to determine for itself from such data, including related decisions not only in the state of the forum, but elsewhere, what, in the opinion of the Federal Court, the court of last resort of the state would decide.

West v. Tel. & Tel. Co., supra;
King v. United Commercial Travelers, 353 U. S. 153, 92 L. Ed. 608.

ARGUMENT.

We refer to the opinion of the Court below as set out on page 6 of the petition.

As to the second statement in the order that there is substantial evidence to support the verdict of the jury, we do not agree but since both the District Judge and the Court of Appeals find that there is, we shall not assign error on this ground, but we do positively deny the third statement **that Fraternal Benefit Societies in Tennessee fall within the purview of and are governed by Section 6434 of Williams' Code set out in the appendix hereto.**

Section 6360 of the Code, the "Exemption Statute," says positively that **"Fraternal Benefit Societies shall be governed by this article** and **shall be exempt from all provisions of the insurance laws of this state."**

The legislature having decided by what authority Fraternal Benefit Societies are to be governed, that question is not left open to the Courts.

LAWS OF STATES AS RULES OF DECISION.

> "The laws of the several states except where the Constitution treaties or statutes of the United States otherwise require or provide, shall be recognized as rules of decision in trials at common law in the courts of the United States, in cases where they apply."
>
> Sec. 725, U. S. C. A.;
> Erie R. R. v. Tompkins, 304 U. S. 64, 82 L. Ed. 1188.

When the legislature says that such societies **"shall be governed by this article"** it is referring to the article in which said Section 6360 is found, which is Article IX of

the Code of Tennessee adopted in 1931. This article as adopted consisted of Sections 6357 to 6433, inclusive, and, of course, the Penalty Statute was not among them.

Where the legislature said in said Section 6360 that **they shall be exempt from all provisions of the insurance laws of this state,** it was referring to Chap. 6, Article I of the Code designated, "NON ASSESSMENT LIFE INSURANCE: GENERAL PROVISIONS" and to any Code provision which could be termed as an Insurance Law.

The "Penalty Statute," Code Sec. 6434, is an insurance law in a different article and is intended to govern only insurance companies of the non-assessment class.

The legislative reasons for separating Fraternal Benefit Societies from Non-assessment Life Insurance Companies or "Old Line Companies" will hereafter be pointed out.

AUTHORITIES NOT PERTINENT.

The Court of Appeals in its order cites the cases of Snyder v. Mystic Circle, 122 Tenn. 248, 268, and Kidd v. National Council J. O. U. A. M., 137 Tenn. 298, 406, as supporting the contention of complainant that Fraternal Benefit Societies are within the purview of the "Penalty Statute," Code Sec. 6434.

We shall discuss the Kidd case first.

A casual reading of that decision will show that this question now before the Court did not arise in that case. There the defendant Order refused to pay the claim on the ground that the certificate holder, W. A. Kidd, had become addicted to drink and died drunk in the police station in Nashville. On the facts of the case the Chancellor held with the complainant and allowed a recovery of the face amount of the certificate but refused the

penalty. He held that the facts developed at the hearing justified the defendant in making the contest in "good faith."

We quote from the opinion of the Supreme Court:

> "Defendant insurance company is not liable for the statutory penalty for refusing in good faith to pay a claim for which it was afterward found liable."

The "Exemption Statute," Code Sec. 6369, on which we here rely, was not cited, not even mentioned.

An examination of the Snyder case cited by the Court of Appeals is subject to the same criticism as the Kidd case.

No mention is made in the opinion by the Supreme Court of Tennessee of the Exemption Statute, Code Sec. 6360. No defense was interposed in that case that Fraternal Benefit Societies are not subject to penalties. The defense urged there that Chap. 141, Acts 1901, now Code Section 6434, imposing a penalty **"on insurance companies"** was void **as impairing the obligation of a contract.** The Supreme Court of Tennessee held said Act valid, and no defense being interposed that Fraternal Benefit Societies in Tennessee are not liable for penalties by virtue of the "Exemption Statute," Code Sec. 6360, the judgment of the Chancery Court was affirmed.

This Honorable Court removed that case to this Court by writ of error and specifically stated:

> "The sole Federal question for decision is whether the above-mentioned statute as applied, impaired the obligation of the contract in suit, and thus violated Article I, Sec. 10, of the Constitution of the United States."
>
> Mystic Circle v. Snyder, 227 U. S. 494, 57 L. Ed. 611.

Said Penalty Statute, Code Sec. 6434, is quoted in full by Judge Hughes, but no mention was made of the "Exemption Statute," Code Sec. 6360.

Judge Williams, the compiler of the 1932 Code, says that Code Sec. 6434 was applied to a Fraternal Benefit Society "without any question as to the application of the statute to such insurance companies." (See his comment on said Section 6434 and referring especially to said case of Snyder v. Mystic Circle.)

It was an obvious error of the counsel of the Mystic Circle in not calling the attention of the Courts to the Exemption Statute, which we now do.

NATURE OF FRATERNAL BENEFIT SOCIETIES.

There is a fundamental difference between Fraternal Benefit Societies and life insurance companies, which furnishes a sound basis for legislative classification into two different groups.

The rationale of the universal exemption to be found in practically all fraternal codes, including that of Tennessee, can best be shown by an explanation of the nature of a fraternal society, as such is defined by the statutes governing same, which, like the Exemption Statute, are uniform throughout the country.

We confine this discussion principally to the Statutes of Tennessee.

A Fraternal Benefit Society is a voluntary association **without capital stock**, organized and carried on solely for the mutual benefit of its members and their beneficiaries and **not for profit;** having a lodge system with ritualistic form of work and a representative form of government (Code Sec. 6361). It has a supreme governing or legislative body and subordinate lodges into which members are

elected and initiated in accordance with its constitutional laws, rules, regulations and prescribed ritualistic ceremonies which subordinate lodges are required to observe (Code Sec. 6358).

Every Fraternal Benefit Society organized or licensed under the Fraternal Benefit Statutes of Tennessee is a charitable and benevolent institution, and all of its funds are exempt from taxation (Code Sec. 6424).

By express enactment they are to be governed by the Fraternal Benefit Statutes of this State.

This is the statute about which the battle rages:

Sec. 6360, Code of Tennessee:

> **"To be governed by what law. Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose, and no law hereafter enacted, shall apply to them unless they be expressly designated therein."**

Insurance companies are organized for ordinary business purposes, for **profit,** for investment and for benefit of credit for the protection of a large business concern by insuring the principal officer of the business, as well as for the protection of the family, all of which is legitimate, praiseworthy and constitutes by far the great amount of insurance in this country.

BASIS FOR EXEMPTION STATUTE.

Article IX of the Tennessee Code comprising the Fraternal Benefit Statutes has been reviewed and discussed by the Tennessee Supreme Court in the case of Hamilton National Bank v. Sam Amster, in 134 Tenn. 537, 184 S. W. 5,

especially with reference to the government of the society (Code Sec. 6360) and the exemption of its funds from attachment or other process for the collection of a debt of the beneficiary. In that case, the Hamilton County National Bank attached by garnishment a fund in the hands of the Royal Arcanum, alleged to belong to Amster. The defendant relied upon the Fraternal Benefit Statutes for relief, especially Sec. 12 of Chap. 480 of the Acts of 1905 (now Sec. 6398 of the New Code). The bill of the Bank assailed the Act as unconstitutional and void. This brought the entire Act under review by the Supreme Court and especially the two Sections 6360 and 6398.

We quote briefly from that case:

> "We find in the latter part of Section 12 (now 6398) the legislative declaration that such associations as fall under the operation of the Act are charitable institutions (now 6424) and their lodge property and funds are by express words made exempt from taxation under the general revenue laws of the state." . . .
>
> "**This provision demonstrates the wide gulf in the legislative mind between such associations as the legislature intended to fall under the operation of this Act and ordinary life insurance companies.**" . . .
>
> "The General Assembly, in enacting the provisions of Section 12, understood that it was dealing with charitable associations, and, as already noted, expressly so declares in that section, and indeed this fact stands out on the face of the entire act. One illustration of it may be found in the definition of a **fraternal** beneficiary association in section 1 of the act, supplemented by sections 2 and 3. Another illustration is in section 4 (now Code Sec. 6360), which **cleaves a clear line between associations falling under the operation of the act** and '**all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose,**' and this

section closes with the emphatic declaration, **'and no law hereafter passed shall apply to them (meaning fraternal benefit associations), unless they be expressly designated therein.'** ''

The following from the above opinion shows clearly the legislative and judicial attitude in Tennessee towards Fraternal Benefit Societies:

"What has been said suffices to show the class of fraternal beneficiary associations which the lawmakers intended to fall within the operation of this act. Now, it is manifest that many points of difference exist between the business of life insurance transacted by such associations and the business of life insurance conducted by ordinary life insurance companies. It is unnecessary to undertake to enumerate these points of difference. Perhaps the fundamental one is the motive which underlies each business. Charity is the underlying motive of the associations covered by the provisions of this act. Such an association enters into the business of life insurance to the end that it may dispense a charity. It has no capital stock, and does no business for profit. Its form of government and system of conducting its business are as stated supra. On the other hand, the underlying motive in the business of ordinary life insurance is not charity at all, but profit. It is moved to enter into the business of life insurance by a wholly different consideration. Our legislation prior to the act in question has recognized the difference. This court, and other courts of last resort, have long been in agreement upon the point that contracts of insurance are proper subjects of classification in matters of legislation. Such contracts are sufficiently distinctive in character to bear a classification separating them from other contracts; **and, more than this, they are sufficiently distinctive in character to bear a classification as between them-**

selves. Insurance Co. v. Whitaker, 112 Tenn (4 Cates), 155, and cases cited at page 173, 79 S. W. 119, 64 L. R. A. 451."

The Exemption Statute in Tennessee first appears in Chap. 480, Acts of 1905. It was amended from time to time but now appears in the new Code as Sec. 6360.

The Penalty Statute which now appears as our Code Sec. 6434 in a separate article from both fraternal and life insurance statutes was first enacted by Chap. 141, Acts of 1901.

DUAL NATURE OF FRATERNAL BENEFIT SOCIETIES.

Many courts have recognized the dual nature of a Fraternal Benefit Society, which is well expressed by the Court in Haynes v. Fraternal Aid Union, 34 Fed. (2) 305, as follows:

> "But we are not dealing with an ordinary contract of insurance made by an ordinary life insurance company; we are dealing here with a class of insurance in which the policyholders are both the insurer and the insured."

The latest judicial expression of the Supreme Court of the United States, dealing with the character of a Fraternal Benefit Society is to be found in the case of The Order of United Commercial Travelers of America v. Wolfe, 67 Sup. Ct. Reporter 1355, 91 L. Ed. 1245, in which the Court was considering a Fraternal Benefit Society domiciled in Ohio under a code governing Fraternal Benefit Societies which, so far as definitions, representative form of government and exemption sections is concerned, is identical to the statutes of Tennessee. The Court in that case was considering the application of the Full Faith and Credit Clause of the United States Constitution and

based its decision upon the nature of such a society, saying:

> "We rely upon the character of the membership application sued upon * * * as something created, regulated and subject to change through a fraternal and representative form of intracorporate government depending for its terms, continuity and unity upon public acts of Ohio creating and regulating fraternal benefit societies."

The Court cites Modern Woodmen v. Mixer, 267 U. S. 544, as follows:

> "The indivisible unity between the members of a corporation of this kind in respect of the fund from which their rights are to be enforced and the consequence that their rights must be determined by a single law, is elaborated in Supreme Council R. A. v. Green, 237 U. S. 592, 59 L. Ed. 1089. The act of becoming a member is something more than a contract, it is entering into a complex and abiding relation, and as marriage looks to domicil, membership looks to and must be governed by the law of the State granting the incorporation."

To subject Fraternal Benefit Societies to a penalty, the proponent of such a claim must find a statute in Tennessee passed since the Act of 1905 expressly designating them as being subject to the penalty.

This the plaintiff cannot do.

NO CONFLICT OF STATUTES, STATUTORY CONSTRUCTION.

There is no conflict between the Exemption Statute, Code 6360, and the Penalty Statute, Code 6434, in our opinion. However, if it should appear that there is a

conflict between the two sections, this eventuality is provided for by one of the early sections of the New Tennessee Code, same being Section No. 13, Vol. 1, page 351, and is as follows:

> "**Conflicts**:—If provisions of different chapters or articles of the Code appear to contravene each other, the provisions of each chapter or article shall prevail as to all matters and questions growing out of the subject matter of that chapter or article."

THE CODE OF TENNESSEE ONE ACT.

The Tennessee Code of 1932 is a comprehensive act of the General Assembly of Tennessee of 1931, and all sections take effect contemporaneously.

Woodroof v. City of Nashville, 183 Tenn. 488.

SPECIAL AND GENERAL STATUTES.

Article IX of the Code is a special act applying only to Fraternal Benefit Societies.

Article X is a general insurance law subjecting insurance companies doing business in the State to 25% penalties under certain conditions.

This special enactment (Code Sec. 6360) prevails over the general statute, the Penalty Statute (Code Sec. 6434).

> "Where there are two acts or provisions one of which is special and particular and certainly includes the matter in question and the other general, which if standing alone would include the same matter and thus conflict with the special act or provision, the special act must be taken as intended to constitute an exception to the general act or provision, especially

when such general and special acts or provisions are contemporaneous, as the legislature is not to be presumed to have intended a conflict."

State of Tenn. v. Safley, 172 Tenn. 389, 112 S. W. (2) 831;

Rodgers v. United States, 185 U. S. 83, 46 L. Ed. 816.

"Where there is a general provision applicable to a multitude of subjects and also a provision which is particular and applicable to one of these subjects and inconsistent with the general provisions, it does not necessarily follow that they are so inconsistent that they both cannot stand.

"The **special provision will be deemed an exception** and the general provision will be construed to operate on all the subjects introduced therein except the particular one which is the subject of the special provision."

Board of Park Commissioners v. City of Nashville, 134 Tenn. 612, 185 S. W. 694.

"The reason and philosophy of the rule is that, when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions unless it is absolutely necessary to give the latter act such a construction in order that its words shall have any meaning at all."

Sedgwick on Constitutional Law and Statutory Construction, page 98.

We insist that the well-known rule of statutory construction applies here:

"Statutes will be construed so as to permit all to stand if possible."

Starkey v. Nixon, 151 Tenn. 637, 220 S. W. 980.

It is the insistence of the Petitioners that the Penalty Statute and the Exemption Statute can be construed so as to let both stand. The construction of the Penalty Statute, as insisted upon by the attorneys for the Respondent, strikes down Section 6360, the Exemption Statute relied upon by the Petitioners.

When the legislature passed the Penalty Statute 6434, it cannot be presumed that it forgot the previous Section 6360, exempting "benefit societies from all provisions of the insurance laws of this state," passed in the same breath.

The only logical conclusion to draw is that the legislature did not intend to inflict penalties on Fraternal Benefit Societies, which it classified in Code 6424 as charitable organizations.

If Code Sec. 6360 means what it says—"that no law hereinafter enacted shall apply to them unless they are expressly designated therein," the Courts are bound to give it effect, and it does not conflict with the "Penalty Statute" for the reason that Fraternal Benefit Societies are not mentioned in the Penalty Statute.

The two statutes can be reconciled by allowing each to operate in its own field as provided by Code Sec. 13 and by applying the reasonable rules of construction that:

(1) The legislature did not intend to pass conflicting statutes; and,

(2) A **special statute** controls a **general provision** in another statute, relating to the same subject.

State v. Safley, supra;
Woodroof v. City of Nashville, 183 Tenn. 483, 192 S. W. (2) 1013.

"Fraternal Benefit Societies are generally governed by special statutes and are, therefore, not considered to be governed by the general insurance laws."

Sec. 10143, Appleman on Insurance;
38 Amer. Jur., Sec. 128, "Mutual Ben. Societies."

In addition to the case of National Bank v. Amster, 134 Tenn. 544, construing the Tennessee Fraternal statutes, and especially the Exemption Statute, Sec. 6360, we have the recent case of Brotherhood of Railroad Trainmen v. Daniels, ... Tenn. App. 266, 75 S. W. (2) 1019, heretofore cited under "Jurisdiction."

REFERENCE BY NAME.

The attorneys for the plaintiff Mrs. Carter in the District Court and in the Court of Appeals, laid much stress on the following words from the Penalty Statute: "**and other persons doing business in this State**"; and, we presume they will do the same in this Court.

There is nothing in the Tennessee statutes to prevent an individual from **doing an insurance business** in this State.

Defendants insist that the attorneys for plaintiff erroneously interpreted said Penalty Statute, Code Sec. 6434.

The Exemption Statute, Code Sec. 6360, provides:

". . . no law hereinafter enacted shall apply to them **unless they be expressly designated therein.**"

The legislature of Tennessee has observed this provision of the Exemption Statute since it was enacted in 1905. In some instances it has placed burdens upon Fraternal Benefit Societies; and in some it has relieved them of burdens imposed upon other companies, but in every instance the subsequent statute has expressly designated them by name—Fraternal Benefit Societies.

By Code Section 6436 (Sec. 1, Chap. 443, Acts 1907), the legislature made it a misdemeanor for,

> "Any insurance company or association **including** Fraternal Benefit Societies"

to contribute to any political party.

They were designated by name in Chap. 3 of the Acts of 1945 (Code Sup., Sec. 1248.175), where they were expressly relieved of the payment of the two (2%) per cent. tax on gross premiums paid by other companies doing business in the State.

(The pertinent portions of said Act are set out in the Appendix.)

THE CASE OF TOBIN, COMMISSIONER OF INSURANCE V. ESTES.

The attorneys for the plaintiff in the Courts below laid much stress on the above case reported in 168 Tenn. 403. They insisted that Fraternal Benefit Societies were not mentioned in the Privilege Tax Act of the State, but that under the designation of "Insurance Companies" they were included and required to pay a privilege tax on each agent soliciting business for them. The Supreme Court expressly held that it did not apply to the Fraternal Benefit Society, but only to the agent.

This case sustains the position of the defendants. If the legislature of 1931 had intended to require the corporation to pay privilege taxes, it would have said so.

DECISIONS OF OTHER STATES ON PENALTY STATUTE.

In considering other data available to assist the Court in deciding, if necessary, what the holding of the Tennessee Supreme Court would be on this question, decisions of the Courts of other states in construing this Exemption Statute, 6360, are helpful and persuasive.

Arkansas:

"The Arkansas Statute Pope's Digest, Sec. 7857 provides that Fraternal Benefit Societies shall be exempt from all provisions of insurance laws of the State, not only in governmental relations with the State but for every other purpose and that no law enacted shall apply to them unless they be expressly designated therein. **We, therefore, hold, applicant being a fraternal benefit society that appellee was not entitled to recover a penalty or attorneys' fee.**"

Sovereign Camp W. of W. v. Mays, 195 Ark. 876, 115 S. W. (2) 851;

Knights of Maccabees v. Anderson (1912), 104 Ark. 417, 148 S. W. 1016.

Georgia:

"Georgia Code, Sec. 56-1704 (2869)—What Law Governs: Operation of insurance laws—such orders or associations shall be governed by this chapter and shall be exempt from the provisions of the insurance laws of this state; and no law hereafter passed shall apply to fraternal beneficiary orders or associations unless it expressly so provides."

The provisions of the Georgia penalty statute (Civil Code 1910, Sec. 2549) were held inapplicable to Fraternal Benefit Societies as defined in Civil Code, Sec. 2866 et seq.

(56-1701 Code 1933) in Brown v. Travelers' Protective Asso. (1932), 45 Ga. App. 410, 165 S. E. 143, the Court pointing out the statute imposing said penalties was enacted many years before enactment of the statutes authorizing the establishment of Fraternal Benefit Orders and hence that the legislature could not have intended to include such orders or societies within its terms; moreover, that Civil Code, Sec. 2869, expressly provided that such societies should be exempt from the provisions of the insurance laws of the State.

Missouri:

The Missouri Exemption Statute is the same as the Tennessee Statute and in the following cases, the penalty sued for was denied on the ground that by said statute they were exempt from penalties:

Olsen v. Supreme Council R. A. (1920), 205 Mo. App. 255, ... S. W. 966;

Morrow v. Nat'l Life Ass'n, 184 Mo. App. 308, 168 S. W. 881.

Texas:

"So, a Texas Statute (Rev. Stat. 1911, art. 4746) pertaining to life, health, and accident insurance companies, and providing for a penalty and attorneys' fees, was held inapplicable to a 'fraternal benefit society' in view of Vernon's Sayles' Anno. Civ. Stat. 1914, art. 4823, providing with respect to such societies: 'Except as herein provided, such societies shall be governed by this act, and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations, but for every other purpose, and no law hereafter enacted shall apply to them, unless they be expressly designated therein', in Sovereign Camp W. O. W. v. Downer (1922), Texas Civ. App., 241 S. W. 229."

Nebraska:

Section 3212 R. S. 1913, is so far controlled by **Section 3299 R. S. 1913** (The Exemption Statute) as to preclude the Court from taxing, as part of the costs, an attorney fee in a suit based upon a certificate of membership in a Fraternal Benefit Society.

Masters v. M. W. of A., 169 N. W. 1.

STRICT CONSTRUCTION.

Code Section 6434, being a Penalty Statute, must be strictly construed.

Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 166 S. W. 1186;
DeRossett Hat Co. v. London Ins. Co., 134 Tenn. 199, 183 S. W. 720.

GENERAL OBSERVATIONS.

A research of considerable of the literature surrounding statutory regulations of Fraternal Benefit Societies, and particularly the exemption section, which is found in the fraternal code in every state, including a run-down of all authorities through the West Digest System, fails to reveal a single case involving a duly licensed Fraternal Benefit Society where the Court refused to give full force and effect to the Exemption Statute. The only exceptions found were those in which the legislature had amended or reenacted laws governing insurance companies in general and had specifically designated Fraternal Benefit Societies therein.

As these petitioners are doing business in practically every State in the Union, the decision of the Court of Appeals in the instant case is of vast importance to them.

They insist that there is a conflict with the decision of another Court of Appeals on the same subject which affects them:

That there is a conflict with a decision of the Court of Appeals of the State of Tennessee on the same subject;

That the Court of Appeals has decided an important question of general law in conflict with the weight of authority in the United States and so far departed from the accepted and usual course of judicial decision as to call for an exercise of this Court's power of supervision.

CONCLUSION.

For the foregoing reasons, it is submitted that the petition for certiorari should be allowed and that the aforesaid judgment of the Court of Appeals for the Sixth Circuit in the instant case should be reviewed and modified and the statutory penalties denied.

Respectfully submitted,

THE MACCABEES and
MODERN WOODMEN OF AMERICA,
Petitioners,

By: McLANE & BATES,
WATKINS, MOORE & CROWNOVER,
Solicitors for Petitioners.

DAVID A. HERSH,
GEORGE G. PERRIN,
GEORGE H. McDONALD,
E. W. DILLON,
Of Counsel.

APPENDIX.

Sec. 6357: Code of Tennessee:

"**Definition of a Fraternal Benefit Society.** Any corporation, society, order, or voluntary association without capital stock, organized and carried on solely for the mutual benefit of the members and their beneficiaries and not for profit, and having a lodge system with ritualistic form of work and representative form of government, and which shall make provision for the payment of benefits in accordance with section 6361, is declared to be a 'Fraternal Benefit Society' (1921, ch. 172, sec. 1)."

Sec. 6358: Code of Tennessee:

"**Societies Deemed to Be Operating Under Lodge System.** Any society having a supreme governing or legislative body and subordinate lodges or branches by whatever name known, into which members shall be elected, initiated, and admitted in accordance with its constitution, laws, rules, regulations, and prescribed ritualistic ceremonies, which subordinate lodges or branches shall be required by the laws of such society to hold regular or stated meetings at least once each month, shall be deemed to be operating on the lodge system (Ib. sec. 2)."

Sec. 6360: Code of Tennessee, and Sec. 66-1504 Ark. (Exemption Statute):

"**To Be Governed by What Law. Except as herein provided, such societies shall be governed by this article and shall be exempt from all provisions of the insurance laws of this state, not only in governmental relations with the state, but for every other purpose,**

and no law hereafter enacted, shall apply to them unless they be expressly designated therein (Ib. sec. 4)."

Sec. 6424: Code of Tennessee:

"**Such Societies Are Charitable Institutions.** Every fraternal benefit society organized or licensed under this article is declared to be a charitable and benevolent institution, and all of its funds shall be exempt from all and every state, county, district, municipal, and school tax, other than taxes on real estate and office equipment (Ib. sec. 30)."

Chapter No. 3: Public Acts of Tennessee, 1945, Sec. 1249.169 of 1949 Pocket Sup. to Tenn. Code:

"Whereas, The Supreme Court of the United States has declared in recent decisions that the business of insurance is interstate commerce, it is therefore declared to be the legislative intent of this Act to revise the taxing statutes of Tennessee applicable to such business so as to provide equal and nondiscriminatory taxation of domestic and foreign insurance companies alike, and to fully comply with the requirements of the Commerce Clause of the Federal Constitution:

"Section 1. Be It Enacted by the General Assembly of the State of Tennessee, That every domestic or foreign insurance company writing life, fire, marine, fidelity, surety, casualty, liability insurance, or other forms of insurance, shall pay direct to the Commissioner of Insurance and Banking the taxes as hereinafter provided for.

"All insurance companies writing the forms of insurance enumerated above, except life insurance companies and **fraternal benefit associations**, orders or societies, and except as provided in Section 2 of this Act applicable to 'Workmen's Compensation' insur-

ance enumerated above, except life insurance pay Two percentum (2%) on gross premium paid by or for policy holders residing in this State or on property located in this State. Life insurance companies shall pay Two percentum (2%) on gross premium receipts from citizens of and residents of this State. All such taxes shall be payable on or before March 1st and September 1st of each year, on sworn returns, forms for which shall be furnished to the companies by the Commissioner of Insurance and Banking."

. . . . . .

Sec. 7:

"Be It Further Enacted, That this Act shall not apply to **fraternal benefit associations and societies as defined in Sections 6357-6433,** inclusive, of the Official Code of Tennessee, nor to those exempt from such provisions as provided in Section 6421 of the said Code."

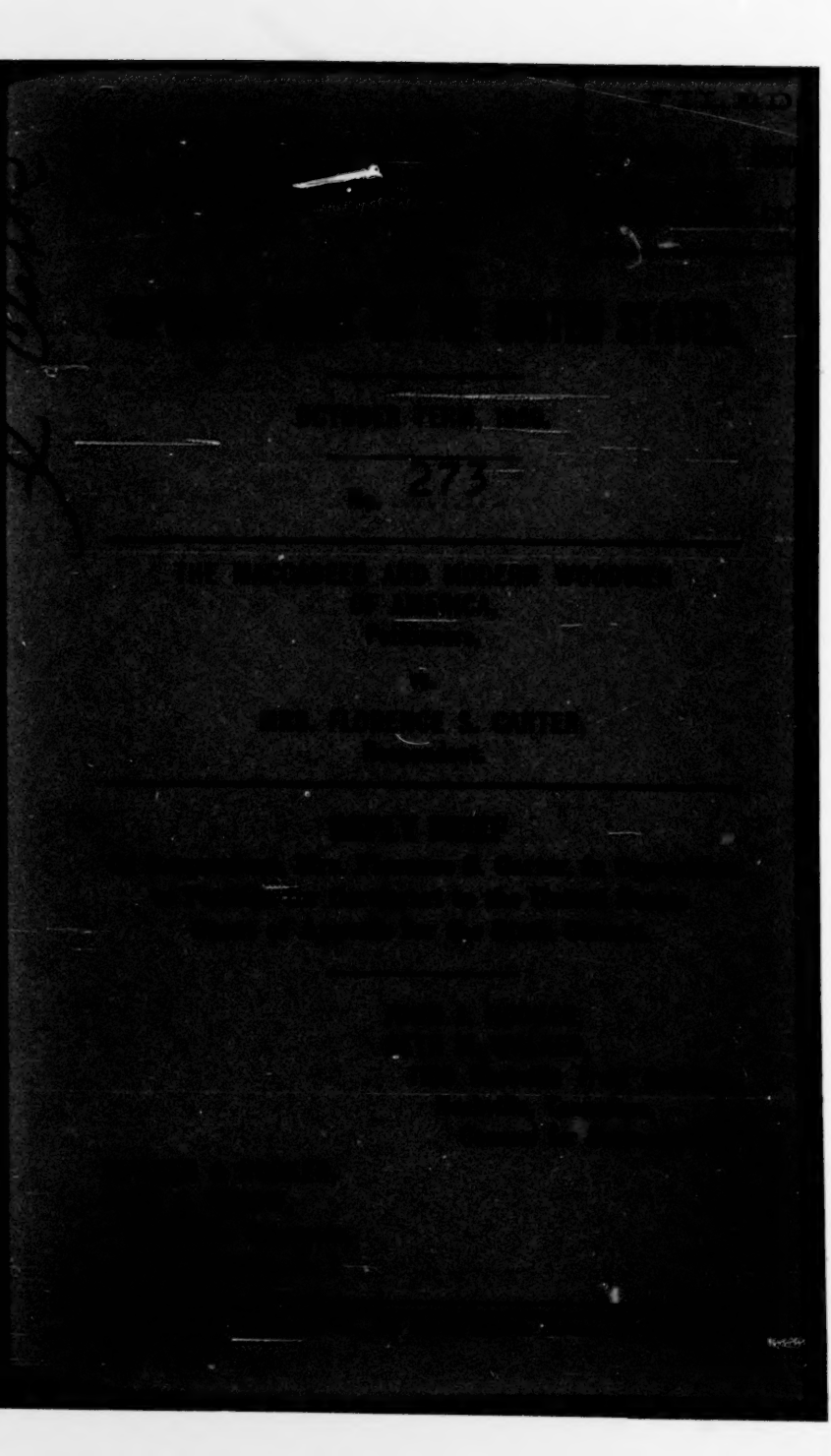
Sec. 6434: Code of Tennessee (Penalty Statute):

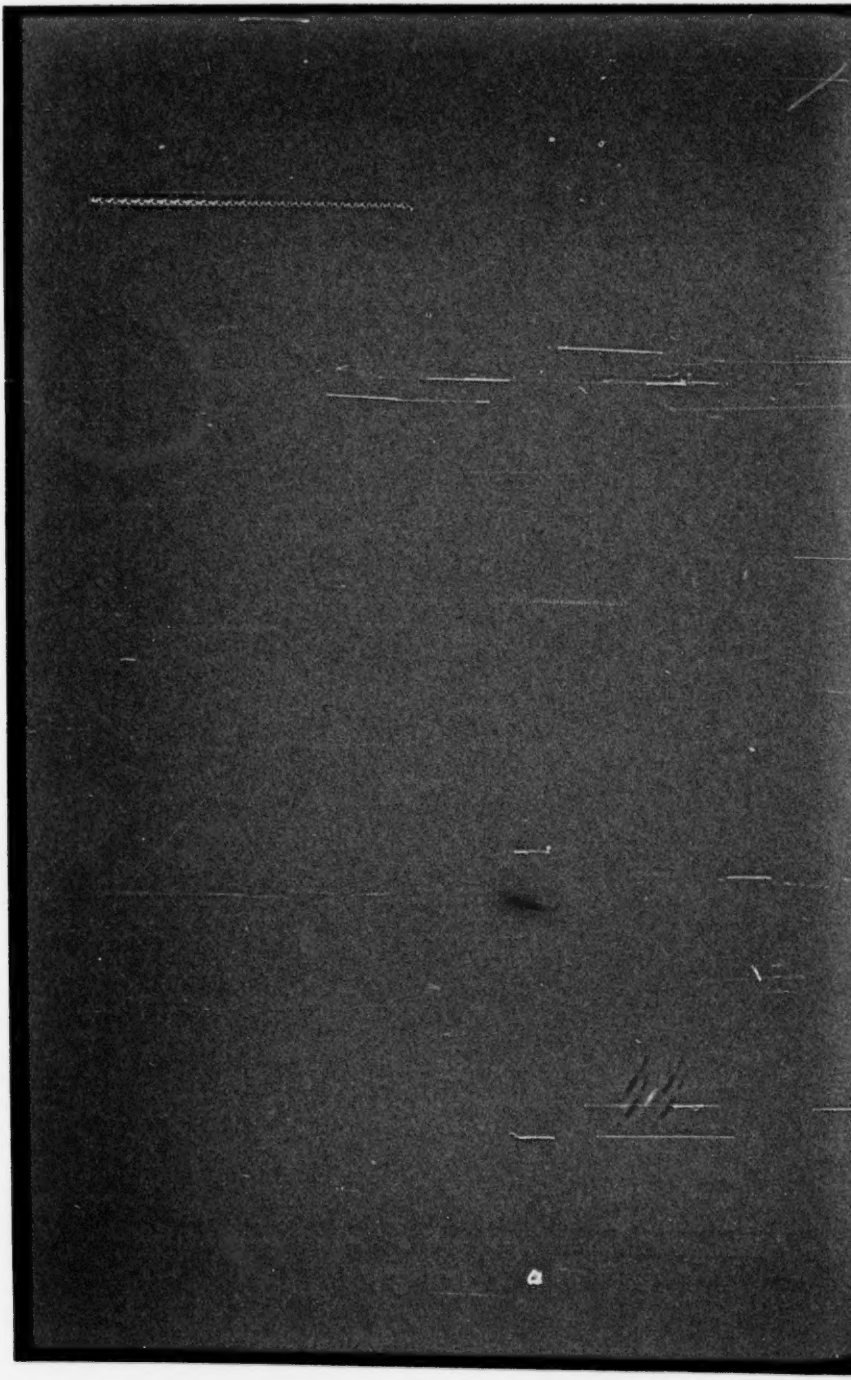
"**Additional Liability Upon Insurers for Failure to Pay Promptly Insurance Losses When Refusal Is Not in Good Faith.** The insurance companies of this state, and foreign insurance companies and other persons doing an insurance business in this state, in all cases when a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent. on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss,

or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss and injury thus entailed (1901, ch. 141, sec. 1)."

Sec. 7670: Pope's Statutes of Arkansas:

"**Penalty and Attorneys' Fees.** In all cases where loss occurs and the fire, life, health or accident insurance company liable therefor shall fail to pay the same within the time specified in the policy, after demand is made therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of such loss, twelve per cent. damages upon the amount of such loss, together with all reasonable attorneys' fees for the prosecution and collection of said loss; said attorneys' fees to be taxed by the Court where the same is heard on original action, by appeal or otherwise and to be taxed up as a part of the costs therein and collected as other cases are, or may be by law collected (Sec. 1, Act of 1905)."





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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950.

No. .....

THE MACCABEES AND MODERN WOODMEN OF AMERICA,
Petitioners,

vs.

MRS. FLORENCE S. CARTER,
Respondent.

REPLY BRIEF

Of Respondent, Mrs. Florence S. Carter, in Opposition to Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit.

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners, The Maccabees and Modern Woodmen of America, are fraternal benefit societies incorporated under the laws of the States of Michigan and Illinois, respectively, and were engaged in writing life and accident insurance policies in Tennessee, and issued certain policies in that State on the life of respondent's husband, John T. Carter (Rec. 2, 4, 8, 9, 15). Insured was accidentally killed June 13, 1946 (Rec. 33). Petitioners refused to pay respondent, the beneficiary of the policies, after due proof of insured's accidental death was furnished them and

formal demand made for the payment of the policies, and to recover on the policies respondent brought two separate actions, which were consolidated and tried together in the United States District Court at Nashville.

Upon special issues submitted to the jury, there was a finding that the refusal of both petitioners to pay the policies sued upon was "not in good faith," and that petitioners' refusal had caused respondent additional loss and expense in an amount in excess of twenty-five per cent of the amount demanded by respondent (Rec. 32, 33). The District Judge approved the verdict of the jury and upon it entered judgment for the amount of the policies sued upon, and interest thereon, and twenty-five per cent additional as provided by Section 6434 of the Tennessee Code to reimburse respondent for the cost and expense incurred by reason of petitioners' bad faith in refusing to pay respondent as they had contracted to do (Rec. 51, 52).

JUDGMENT OF CIRCUIT COURT OF APPEALS.

Following the overrulement by the District Judge of petitioners' motion for a new trial, both petitioners appealed the consolidated cause to the Court of Appeals for the Sixth Circuit (Rec. 65). The cause was argued and submitted in that court on April 6, 1950, before Judges Allen, Martin and McAlister, which four days later, on April 10, 1950, held that the verdict of the jury was supported by substantial evidence; that under Tennessee law fraternal benefit societies fall within the purview of and are governed by the provisions of **Section 6434** of **Williams' Tennessee Code**, as held by the Tennessee Supreme Court in the cases of **Snyder v. Mystic Circle**, 122 Tenn. 248, 268, 122 S. W. 981, and **Kidd v. National Council J. O. U. A. M.**, 137 Tenn. 398, 406, 193 S. W. 130; and there being no reversible error the judgment of the District Court was in all things affirmed (Rec. 559).

Judge Martin is a former **Tennessee** Federal Judge, an able jurist familiar with the laws of **Tennessee,** and his opinion is entitled to great weight.

Continuing to litigate, petitioners on May 4, 1950, filed a petition for rehearing in the United States Court of Appeals, which was denied on May 29, 1950 (Rec. 559, 591).

Still not satisfied, petitioners, who were found guilty by the two lower courts of having refused **in bad faith to comply with their contracts,** and making no contention here that there is not substantial evidence to support the judgment of the two lower courts, have petitioned this Honorable Court **to exercise its discretion** and grant a writ of certiorari and hold that **under Tennessee law** said **Section 6434** of the **Tennessee Code,** creating additional liability upon insurers for failure to pay insurance losses, when refusal to pay is in **bad faith,** has no application to fraternal benefit societies or associations writing insurance in Tennessee.

QUESTION PRESENTED.

The only question involved is whether under **Tennessee law** petitioners fall within the purview of **Section 6434** of the **Tennessee Code.**

REASONS WHY THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY POWER TO GRANT THE WRIT OF CERTIORARI PRAYED FOR.

1.

The Court of Appeals for the Sixth Circuit has not rendered a decision in this case in conflict with the decision of another Circuit Court of Appeals on the same matter.

Railway Mail Assn. v. Chamberlain, 148 Fed. (2d) 206; Opinion of Sixth Circuit Court in this case, Rec. 559.

2.

The Circuit Court of Appeals for the Sixth Circuit has not decided any question of **Tennessee law** in conflict with an applicable local decision.

Brotherhood of Railroad Trainmen v. Daniels, 18 Tenn. App. 264, 75 S. W. (2d) 1019;
Section 6434, Williams' Tenn. Code;
Snyder v. Mystic Circle, 122 Tenn. 248, 268, 122 S. W. 981;
Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406, 193 S. W. 130;
Tobin v. Estes, 168 Tenn. 403, 407, 79 S. W. (2d) 550;
Supreme Ruling of the Fraternal Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292.

3.

This Court will not attempt to determine the **law of Tennessee** construing **Section 6434** of the **Tennessee Code** if such construction has **not** been given by the court of last resort of that state, but in the absence of such guidance will leave undisturbed the interpretation placed upon this purely local law by a Tennessee United States District Judge of long experience who tried the case **in Tennessee**, and affirmed by the three United States Circuit Judges, one of whom is a former United States District Judge **in Tennessee**, which state is included in the Sixth Circuit.

MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280, 86 L. ed. 846, 62 S. Ct. 607;
Helvering v. Stuart, 317 U. S. 154, 87 L. ed. 154, 63 S. Ct. 140.

"No decision of the Supreme Court of Michigan, or of any other court of that state, construing the relevant Michigan law, has been brought to our attention. In the absence of such guidance we will leave undisturbed

the interpretation placed upon purely local law by a Michigan Federal Judge of long experience, and by three Circuit Judges whose circuit includes Michigan."

MacGregor v. State Mutual Life Assur. Co., 315 U. S. 280, 281, 86 L. ed. 846, 848, 62 S. Ct. 607.

4.

The Court of Appeals for the Sixth Circuit has not decided a question of **Tennessee law** in conflict with the weight of **Tennessee cases**, but, to the contrary, in accord with them.

Snyder v. Mystic Circle, 122 Tenn. 248, 268, 122 S. W. 981;

Kidd v. National Council J. O. U. A. M., 137 Tenn. 398, 406, 193 S. W. 130;

Tobin v. Estes, 168 Tenn. 403, 407, 79 S. W. (2d) 550.

BRIEF AND ARGUMENT.

Section 6434 of the **Tennessee Code** was taken from **Chapter 141, Section 1, Acts 1901,** which provides:

> "6434. **Additional liability upon insurers for failure to pay promptly insurance losses when refusal is not in good faith.** The insurance companies of this state, and foreign insurance companies **and other persons doing an insurance business in this state,** in all cases where a loss occurs and they refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which said loss occurred, shall be liable to pay the holder of said policy, in addition to the loss and interest thereon, a sum not exceeding twenty-five per cent on the liability for said loss; provided, that it shall be made to appear to the court or jury trying the case that the refusal to pay said loss was not in good faith, and that such failure to pay inflicted additional expense, loss, or injury upon the holder of said policy; and, provided, further, that such additional liability, within the limit prescribed, shall, in the discretion of the court or jury trying the case, be measured by the additional expense, loss, and injury thus entailed (1901, ch. 141, sec. 1)." (Emphasis ours.)
>
> Williams' Tenn. Code, Sec. 6434.

We have emphasized in the foregoing section the words "and other persons doing an insurance business in this state," which are all-inclusive, to show that the statute covers not only Tennessee insurance companies and foreign insurance companies, **but all other persons doing an insurance business in Tennessee.** This was intended, of course, to include fraternal insurance companies or any other person or persons, by whatsoever designated name.

The same **Code, Section 14**, provides:

> "Definitions.—Words used in this Code in the past or present tense include the future. Words importing the masculine gender include the feminine and neuter; singular includes the plural and the plural the singular; **the word 'person' includes a corporation, firm or association**; . . ." (Emphasis ours.)

Reading **Section 6434** of the **Code** with **Section 14**, the former may be treated as if it contained the following language:

> "The insurance companies of this state, and foreign insurance companies and other persons (including a corporation, firm or association) doing an insurance business in this state," shall be liable, etc.

By **Chapter 480, Acts 1905**, the Tennessee Legislature enacted a statute entitled, "An Act to provide for the organization, admission and regulation of fraternal beneficiary associations transacting the business of life insurance; and to repeal all laws in conflict with the provisions of this Act." **Section 4** of this **Act** provides:

> "Be it further enacted, that except as herein provided, such associations shall be covered by this Act, and shall be exempt from all provisions of the insurance laws of this State, not only in governmental relations with the State, but for every other purpose, and no law hereafter passed shall apply to them unless they be expressly designated therein."

This is the same language which was later to appear in **Section 6360** of the **Tennessee Code.** It is this section that petitioners insist is an "exemption statute" which permits them to escape from **Section 6434** of the Code providing additional liability upon insurers who refuse in bad faith to comply with their contracts.

Long after the passage of **Chapter 480, Acts 1905**, or the so-called "exemption statute", and in fact at its September Term, 1909, the Supreme Court of Tennessee in the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, 268, 122 S. W. 981, had held that a fraternal benefit society was liable for the additional liability imposed by **Section 1, Chapter 141, Acts 1901** (later to become **Section 6434** of the Code), for its refusal when not in good faith to pay its losses, and the court imposed twenty-five per cent additional liability on the Mystic Circle for its bad faith refusal to pay the amount of its life insurance policy issued to Snyder.

The Mystic Circle attacked the constitutionality of said **Chapter 141, Acts 1901.** The court would not have permitted the Mystic Circle, a fraternal benefit society, to raise the question of the constitutionality of the Act unless it had application to fraternal benefit societies.

Motor Transportation Co. v. Carden, 164 Tenn. 416, 423, 50 S. W. (2d) 230;
Cheatham County v. Murff, 176 Tenn. 93, 105, 138 S. W. (2d) 430.

At that time **Section 4, Chapter 480, Acts 1905** (later to become **Section 6360, Code of 1932)** was in full force and effect.

This case was by writ of error taken to the Supreme Court of the United States, where it was decided February 24, 1913, in an opinion delivered by Mr. Justice Hughes. **Mystic Circle v. Snyder,** 227 U. S. 497, 57 L. ed. 611. This Court held **Chapter 141, Acts 1901,** of the Tennessee Legislature constitutional and valid, and pointed out:

> "The statute is aimed not at the rights secured by the contract, but at dishonest methods employed to defeat them. The additional liability is attached to bad faith alone. This is the necessary effect of the proviso. It is only when it is 'made to appear to the

court or jury trying the case that the refusal to pay said loss was not in god faith' that the added recovery may be had. It must also appear that such refusal inflicted 'additional expense, loss, or injury' upon the policy holder, and it is this further expense, loss, or injury that measures the amount to be allowed, which is not to exceed twenty-five per cent of the liability on the policy."

Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611.

This Court would not have permitted the Mystic Circle to have questioned the constitutionality of the Act unless fraternal benefit associations or societies such as the Mystic Circle were covered by its provisions.

Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 463, 89 L. ed. 1725, 1736, 65 S. Ct. 1384;
Coffman v. Breeze Corporations, Inc., 323 U. S. 316, 325, 89 L. ed. 264, 271, 65 S. Ct. 298.

That such fraternal benefit society was liable under said Act, if it refused in bad faith to pay the holders of its policies, was recognized by the Tennessee Supreme Court in the case of **Kidd v. National Council J. O. U. A. M.**, 137 Tenn. 398, 406, 193 S. W. 130, later decided in the year 1916. In this case, which was tried in the lower court without the intervention of a jury, the Supreme Court of Tennessee held that upon the facts developed at the hearing, the society was not acting in bad faith in declining to pay the policy or certificate sued upon, and for that reason denied the imposition of additional liability.

Chapter 172, Acts 1921, of the Tennessee Legislature was passed April 9, 1921. **Section 4** of this **Act** is in the same words as **Section 4, Chapter 480, Acts 1905.** Section 6360 of the Code, or what the petitioners term the "exemp-

tion statute", is in the same words as **Section 4, Chapter 172, Acts 1921.**

ADOPTION OF TENNESSEE CODE IN 1931.

In 1931 the Legislature of Tennessee adopted an Official Code, which became effective January 1, 1932 (Sec. 26, Vol. 1, Williams' Tenn. Code). The Code is a comprehensive act of the Legislature of Tennessee and all sections took effect contemporaneously. Woodruff v. City of Nashville, 183 Tenn. 483, 192 S. W. (2d) 1013. At the time the Code was adopted in 1931 it had been understood by the bench and bar of Tennessee since at least September, 1909, when the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, was decided, that fraternal insurance societies were liable under **Section 1, Chapter 141,** Acts 1901, when their refusal to pay their policies or certificates was not in good faith. This understanding of the law was reaffirmed by the case of **Kidd v. National Council of J. O. U. A. M.,** supra, decided in 1916.

NO CHANGE GOVERNING RIGHTS OF PARTIES MADE BY TENNESSEE CODE.

As has been shown, the **1932 Official Code** of Tennessee made no change in the statutes of the state involving the rights of the parties in controversy, from what they were in September, 1909, when the Supreme Court of Tennessee decided the case of **Snyder v. Mystic Circle,** 122 Tenn. 248, and in December, 1916, when the case of **Kidd v. National Council J. O. U. A. M.,** 137 Tenn. 398, was decided.

The **1932 Tennessee Official Code** is divided into chap. ters. **Chapter 6** is devoted entirely to insurance and insurance companies. **Williams' Tenn. Code, Vol. 4, end of Sec. 6083. Chapter 6** is divided into sixteen separate articles. **Williams' Tenn. Code, Vol. 4,** end of Sec. 6083. The sections of the **Code** appearing under these sixteen articles

begin at **Section 6084** and end with **Section 6459.42.** These deal with various types of insurance companies, including non-assessment life insurance, life and casualty insurance upon the assessment plan, insurance brokers, life insurance agents, fire, indemnity and casualty agents, domestic, mutual or assessment fire insurance companies, state mutual companies, county mutual companies, fire and marine companies, fraternal benefit societies or associations, voting trust agreements for life insurance companies, regulation of industrial, health, life or accident insurance companies, and contain various statutes relating to the insurance laws in Tennessee too numerous to mention herein.

Standing separately and alone is the so-called "penalty statute," in two sections, and to which **Chapter 6, Article 10,** of the **Code is exclusively devoted.** One of these is **Section 6434,** hereinbefore quoted, creating additional liability upon insurers for failure to comply with their contract, when the refusal to pay is in bad faith. The other is **Section 6435,** which imposes additional liability on policy holders in favor of "such insurance company, corporation, firm or person, in a sum not exceeding twenty-five per cent of the amount of the loss claimed under said policy", when the suit was not filed in good faith. Neither of these sections of the Code is restrictive. The Legislature did not intend for any domestic or foreign insurance company, or other persons, including fraternal benefit associations or societies "doing an insurance business in this state", to attempt to escape just obligations, but intended to impose additional liability upon all of them when "the refusal to pay said loss was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the holder of said policy."

On the other side, clearly it was the legislative intent that under **Section 6435** any holder of a policy, whether it

be issued by a domestic or foreign insurance company, "or other persons doing an insurance business in this state," was entitled to recover of such policy holder when an action was brought by the holder and "said suit was not in good faith," recoverable in an amount not exceeding twenty-five per cent of the amount of the loss claimed under the policy.

Under **Sections 6434** and **6435** of the **Code** no exceptions were created. It is well settled in Tennessee that where no exceptions are made in the provisions of a statute, the courts will not create any exceptions. **Forrest v. State,** 154 Tenn. 13, 285 S. W. 589. When the Legislature in **Section 6434** of the **Code** provided that it should apply to both domestic and foreign insurance companies, and still further that it should include "**and other persons doing an insurance business in this state,**" by the express language of the statute it included fraternal benefit associations or societies, and **every legal entity doing an insurance business in the state, regardless of the name.**

It must not be overlooked that **Section 6360** or the so-called "exemption section" does not provide that fraternal benefit societies shall not be liable for additional liability in the event they fail in bad faith to pay a loss within sixty days after formal demand is made therefor, but it only provides that "**no law hereafter enacted**" shall apply to them unless they be expressly designated therein.

Section 6434 or the so-called "penalty section," and **Section 6360** or the so-called "exemption section," were passed and enacted into law contemporaneously.

NO CONFLICT OF STATUTES.

There is no conflict between **Section 6430** or the "penalty section," and **Section 6360** or the so-called "exemption section," of the Code.

In the case of **Tobin v. Estes**, 168 Tenn. 403, 407, 79 S. W. (2d) 550, the same identical insistence was made in the Supreme Court of Tennessee as petitioners make here. **Section 2, Article 3, Chapter 13, Public Acts of the Second Extraordinary Session of 1931**, provided that "each insurance agent, solicitor, member of a firm, except those representing domestic, state and county mutual fire insurance companies, shall for the purpose of soliciting or writing insurance in this state pay a privilege tax," etc. The agent of the Modern Woodmen of America, which is one of the petitioners, and one of its attorneys here, contended that the agent was not liable for the privilege tax. The Supreme Court of Tennessee rejected the argument and held that it could not except or exempt fraternal benefit society agents from the tax when the Legislature had not seen fit to do so.

Tobin v. Estes, supra, 407.

Petitioners also completely ignore in their effort to escape from **Section 6434** of the **Code**, for their refusal in bad faith to comply with their contracts, another well recognized rule of Tennessee statutory construction. A statute should be so construed, if possible, that every word shall have force and effect, and that no clause or word shall be superfluous or insignificant.

Memphis Street R. R. Co. v. Mayor etc., 44 Tenn. 406, 417.

It was not necessary for the Legislature to name the petitioners in **Section 6434** of the **Code** to include them. They clearly fall within the definition "and other persons doing an insurance business in this state." To hold otherwise would attribute to the Legislature an intention to prohibit fraud against the insurance companies of Tennessee, and foreign insurance companies, "and other persons doing an insurance business in this state," and to permit the fraternal benefit societies or associations writ-

ing insurance in Tennessee to refuse in bad faith to pay their obligations and escape with impunity.

IN ABSENCE OF A DECISION OF TENNESSEE COURT ON THE POINT, THE SUPREME COURT OF THE UNITED STATES WILL LEAVE UNDISTURBED AN INTERPRETATION PLACED ON A STATE STATUTE BY A LOCAL FEDERAL DISTRICT JUDGE AND BY THREE JUDGES OF THE CIRCUIT COURT OF APPEALS WHOSE CIRCUIT INCLUDES SUCH STATE.

Federal courts since the decision of **Erie R. R. Co. v. Tompkins,** 304 U. S. 64, 78, 82 L. ed. 1188, 1194, 58 S. Ct. 770, follow the statutes and the decisions of the court of last resort of the state in which the action is pending or whose laws are applicable to the issue.

West v. American Tel. & Tel. Co., 311 U. S. 223, 236, 85 L. ed. 139, 143, 144, 61 S. Ct. 179.

The United States District Judge for the Middle District of **Tennessee,** with years of experience, is presumed to have been familiar with the **Tennessee** statutes and the **decisions of its court of last resort,** which is the Supreme Court of Tennessee. He held that **Section 6434** of the **Code of Tennessee** was the law of the case as construed by the **Supreme Court of Tennessee,** and entered judgment for the additional liability against petitioners for their refusal in bad faith to pay the respondent, as found by the jury (Rec. 51, 52).

The United States Court of Appeals for the Sixth Circuit, which circuit includes **Tennessee,** held "that under Tennessee law fraternal benefit societies fall within the purview of, and are governed by, the provisions of Section 6434, Williams' Tennessee Code. Snyder v. Mystic Circle, 122 Tenn. 248, 268; Cf. Kidd v. National Council J. O. U. A. M., 137 Tenn. 398" (Rec. 559).

Judge John D. Martin, a former United States Judge for the Western District of **Tennessee**, and one of the six Judges for the Sixth Circuit, **participated** in the decision of this case (Rec. 559). He is a Judge of many years experience and familiar with **Tennessee** decisions.

Assuming for the moment that the Supreme Court of **Tennessee** had not decided the question raised in the petition for certiorari, it is now well settled that this Court will leave undisturbed an interpretation placed upon a state statute by a **local** Federal District Judge, and by the Judges of the Federal Circuit Court of Appeals whose circuit includes **such state.**

MacGregor, Extr., v. State Mutual Life Assur. Co., 315 U. S. 280, 281, 86 L. ed. 846, 848, 62 S. Ct. 607.

It is respectfully submitted that this Court may properly assume that the **Tennessee** Federal District Judge who tried this case knew the applicable law of **Tennessee**, and whose decision was found to be correct and affirmed by the United States Court of Appeals for the Sixth Circuit, with another Judge from **Tennessee** as a member of the three-judge court **participating** in the decision, which was unanimous (Rec. 559).

In petitioners' brief the case of **Brotherhood of Railroad Trainmen v. Daniels** (18 Tenn. App. Rep. 264), 75 S. W. (2d) 1019, is cited in support of a statement therein that a fraternal benefit society in Tennessee operating upon the assessment plan has its liability or non-liability determined by the common law and Tennessee statutes particularly applicable to it, and not by statutes applicable to life insurance companies. There is no criticism of this statement. Whether it was the law of Tennessee or material in the case was not before the court. It was pure dictum. However, the question of whether **Section 6434** of the Code, or the Tennessee additional liability or penalty statute, had

application, was not involved or not mentioned in the case. Additional liability or a penalty was not sued for. Liability was denied under the certificate sued upon for the reason that the insured had made a false statement in his application for insurance, concerning the condition of his health, and since Daniels, the insured, was a member of the Brotherhood of Railroad Trainmen which issued the certificate and was a fraternal benefit society, the by-laws and constitution of the Order were a part of the certificate. Under the laws of Tennessee the fraternal benefit society had a right to show that the certificate was obtained by fraud, which avoided the certificate.

The Court of Appeals is an intermediate court in Tennessee. Had its decision related in any respect to whether a fraternal insurance company is liable under **Section 6434** of the **Code**, its opinion would have no effect if in conflict in any respect with an opinion of the Tennessee Supreme Court. That court denied a writ of certiorari in the case. However, it is well settled in Tennessee that "a mere denial by this (Supreme) Court of a writ of certiorari to the Court of Appeals does not commit us to alter views expressed in a particular opinion. We are particularly concerned on such application with the result reached."

Bryan v. Aetna Life Ins. Co., 174 Tenn. 602, 611, 130 S. W. (2d) 85;

Powers v. L. & N. R. R. Co., 183 Tenn. 526, 528, 194 S. W. (2d) 241.

The case of **Brotherhood of Railroad Trainmen v. Daniels**, 18 Tenn. App. Rep. 264, was considered by the United States Court of Appeals for the Sixth Circuit. It is referred to and quoted from on page 39 of petitioners' original brief in the Circuit Court of Appeals, and in the petition to rehear on pages 7 and 8. It was undoubtedly considered by the Circuit Court of Appeals to have had no application whatever to this cause, as indeed it does not.

DECISIONS IN OTHER STATES CONSTRUING ADDITIONAL LIABILITY OR PENALTY STATUTES.

Space will not here permit a synopsis of the statutes of the states referred to which the cases cited by petitioners construe, holding they do not apply to fraternal insurance companies. An examination of the statutes of Arkansas, Georgia, Missouri and Texas will show that none of them are as broad as the Tennessee Code, Section 6434, or contain the all-inclusive language "and other persons doing an insurance business in this state."

To correct this imperfection in the Texas statute, the legislature of that state later amended the statute so as to include fraternal benefit societies.

Grand Lodge Free and Accepted Masons of Texas v. Walker (Tex. Civ. App.), 110 S. W. (2d) 945.

Many cases construing statutes in various states could be cited in which the courts held that under the particular language of the statute fraternal benefit societies were included, but it occurs to us that this is not necessary or helpful because we are concerned with a **Tennessee** statute. However, see **Lane v. Brotherhood of Locomotive Engineers**, 73 Pac. (2d) 1356 (Ore.); and **Bowen v. Railway Mutual Assoc.**, 54 Fed. (2d) 391 (D. C. Fla.).

The decisions of courts other than in Tennessee, construing the statutes of the respective states, were cited by petitioners in their original brief in the Circuit Court of Appeals (p. 40), and in their petition to rehear (pp. 17-22). These cases evidently were held by that Court to be inapplicable because it was dealing with a **broader Tennessee statute** and the **law of that state** as construed by its courts.

NO CONFLICT OF DECISION OF UNITED STATES CIRCUIT COURT OF APPEALS FOR SIXTH CIRCUIT IN THIS CAUSE WITH ANOTHER CIRCUIT COURT OF APPEALS ON THE SAME MATTER.

In the brief of petitioners it is insisted that the decision of the Circuit Court of Appeals for the Sixth Circuit in this cause, holding petitioners liable under **Section 6434** of the **Tennessee Code** and **Tennessee cases,** is in conflict with the decision of the Court of Appeals for the Eighth Circuit in **Railway Mail Assn. v. Chamberlain,** 148 Fed. (2d) 206, with respect to **Arkansas** law. There can be no possible conflict in these decisions, because the decision of the Court for the Sixth Circuit in this cause relates to **Tennessee** law, whereas the decision in the Eighth Circuit relates to **Arkansas** law. However, a mere reading of the Eighth Circuit case will demonstrate no possible conflict. The question before the court in the Eighth Circuit case was whether the Railway Mail Association was an **accident** insurance company or **a fraternal benefit society.** It was conceded that if it was a fraternal benefit society, **Section 7670 of Pope's Digest of the Statutes of Arkansas** fixing a twelve and one-half per cent statutory penalty and attorney's fee had no application, since under the statutes of Arkansas fraternal insurance companies were not liable for said penalty or attorney's fee. In the course of the Court's opinion, Circuit Judge Sanborn said:

> "It is conceivable that the Supreme Court of Arkansas might, if this case were before it, hold that the Association is not a fraternal benefit society and is subject to the imposition of the statutory penalty and attorney's fee. The question is debatable and perhaps doubtful. There is no reason, however, why this court should overturn the ruling of the trial court upon this doubtful question of Arkansas law. In deciding what the highest court of a state would probably hold the state law to be, great weight may properly be ac-

corded by this Court to the view of the trial court. This Court would be justified in adopting a view contrary to that of the trial court, only if convinced of error."

Railway Mail Assn. v. Chamberlain, 148 Fed. (2d) 206, 208.

The Arkansas Supreme Court in **Gallagly v. American Ins. Union**, 20 S. W. (2d) 642, many years before held that under the language of **Section 6155** of the **Arkansas Code** a fraternal insurance company was not liable for an attorney's fee for failure to pay claims due by it.

The question in this case is not whether the petitioners are **fraternal benefit societies** or **accident insurance companies**, but whether under **Tennessee law** they are governed by **Section 6434** of the **Tennessee Code**, as held by the Tennessee Supreme Court, the United States District Judge, and the United States Court of Appeals for the Sixth Circuit.

CONCLUSION.

Section 6434 of the **Tennessee Code** does not make the mere refusal to pay sufficient evidence of bad faith to justify the added recovery. It requires that bad faith and proof of subsequent additional loss be shown. The additional liability provided for attaches only in the case of bad faith on the part of the insurer.

Supreme Ruling of the Mystic Circle v. Snyder, 227 U. S. 497, 57 L. ed. 611, 33 S. Ct. 292;

Globe Indemnity Co. v. Union Planters Bank & Trust Co., 27 Fed. (2d) 496.

"Not in good faith" implies a lack of good or moral intent, as the motive for refusal to pay the loss, and describes a state of mind which underlies and causes the act of refusal to pay.

Silliman v. International Life Ins. Co., 135 Tenn. 646, 188 S. W. 273;

Columbian National Life Ins. Co. v. Harrison, 12 Fed. (2d) 986.

The petitioners, in a fair and impartial trial before the United States District Judge and a jury, were found guilty of acting "not in good faith" and a lack of good or moral intent as the motive for refusal to pay to respondent the amount of insurance for which petitioners had insured the life of respondent's husband against death by accidental means. The Circuit Court of Appeals for the Sixth Circuit, within four days after this cause was argued and submitted, affirmed the judgment of the District Court, holding no error was committed in the trial and that petitioners were liable for the additional loss or damage occasioned respondent by reason of petitioners' refusal in bad faith to comply with their contracts of insurance. They make no contention to the contrary in this Court, but insist that the Legislature of Tennessee did not intend by **Section 6434** of the **Code** to protect policyholders against what in effect is a fraud when fraternal benefit associations or societies refuse in bad faith to pay their contractual obligations. Certain it is that this position is not appealing to the Court to invoke its **discretionary power** to grant a writ of certiorari to disturb the concurrent judgment of the two lower courts.

For the foregoing reasons we respectfully submit that the petition for certiorari is without merit and should be denied.

Respectfully submitted,

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